Yap Chee Hean v Public Investment Bank Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-263–03 OF 2013
NALLINI PATHMANATHAN J
30 AUGUST 2013

Contract — Agency — Principal and agent — Trading account — Whether defendant and dealer's representative enjoyed relationship of principal and agent — Whether dealer's representative acted as plaintiff's agent for purposes of executing share trades — Liability of principal — Whether defendant was liable for unauthorised trading by dealer — Whether dealer was acting within scope of her duty as dealer's representative — Estoppel — Whether plaintiff had colluded with dealer or ratified unauthorised trades

On 3 March 2004, the plaintiff opened a share trading account (the trading account) with the defendant, a stock broking firm, for the purposes of trading on the Bursa Malaysia Securities Bhd ('Bursa'). The trading account was wholly operated by one Teh Bee Yean ('TBY'), a commissioned dealer's representative with the defendant. TBY took orders and directions from the plaintiff in respect of the trades on the Bursa. It was an undisputed fact that TBY had misused the plaintiff's trading account by carrying out unauthorised transactions without the plaintiff's consent, namely by executing trades in respect of which she received no instructions and failing to execute trades which she had been authorised to execute. As a consequence of the misuse of the trading account, there were now no shares in the plaintiff's trading account and monies the plaintiff claimed to have deposited for the purposes of the trading account were missing. The plaintiff reported the unauthorised acts of TBY to the defendant. An investigation carried out by the defendant showed that TBY had used the plaintiff's share trading account to perform personal trading of shares without the knowledge of the defendant's management personnel. However, the defendant took the stand that it was not liable for TBY's fraudulent or dishonest acts. In short, the defendant was of the view that TBY was not an employee and as such it was not vicariously liable for TBY's dishonest acts. The plaintiff filed an action against the defendant premised variously and alternatively on breach of contract, tort and breach of trust for losses he had suffered. The plaintiff's claim for the sum of RM1,937,207.90 was in respect of monies that the plaintiff claimed to have deposited with the defendant as payment for shares, when no such shares were purchased by TBY. In essence it was the plaintiff's case that he had undertaken the share trades through the defendant and that therefore the defendant was ultimately responsible for the loss of RM1,937,207.90. The plaintiff submitted that as TBY, who worked under the direction and supervision of the defendant on

their premises, was at all material times the defendant's agent, the defendant was responsible for TBY's acts of misfeasance. The defendant denied liability for TBY's dishonesty maintaining that TBY was the plaintiff's agent for the purposes of executing share trades.

Held, allowing the plaintiff's claim with costs of RM45,000:

(1) The relationship between the plaintiff and the defendant was governed by the agreement entered into between them on 3 March 2004, namely the share trading application form executed by the parties when the plaintiff opened a share trading account with the defendant. The terms as contained in the share trading application form comprised the primary agreement or contract between the plaintiff and the defendant. As the primary relationship for the purposes of share trading was between the plaintiff and the defendant it followed that the defendant and TBY comprised one unified entity. In other words the dealer and the dealer's representative were indivisible. In so far as the plaintiff client was concerned, TBY was the defendant's agent and it was artificial to draw a distinction between the functions and duties of TBY and the defendant. Although TBY was the plaintiff's agent for the limited purposes of taking and executing trades on the direction of the plaintiff, this did not and could not detract from the fact that as and when TBY executed the trades through the engine of the Bursa, she did so as the defendant's agent (see paras 68–69 & 75).

(2) In view of the primary contract between the plaintiff and the defendant and the undisputed fact that TBY misused the plaintiff's trading account by carrying out unauthorised trades, it followed that the defendant as TBY's principal was liable for the same. Further, there was no evidence to suggest that the plaintiff had colluded with TBY or even that he was aware and therefore ratified the unauthorised trades, so as to allow estoppel to set in. Based on the evidence it was clear that the plaintiff was an innocent party, who had entrusted the entirety of the operations of his share investment dealing to TBY. In the circumstances, the defendant was liable in contract for the unauthorised or fraudulent acts of its agent, TBY (see paras 29, 84–89).

(3) Alternatively, the defendant as principal was liable for the acts of its agent, TBY, vis-a-vis the plaintiff. When executing trades in the plaintiff's trading account as an agent of the defendant, TBY was acting within the scope of her duty as a dealer's representative. To that extent therefore it could be said that TBY was acting within the scope of her apparent authority, although dishonestly, in so far as the plaintiff and the defendant were concern. The defendant was liable for the dishonest acts or unauthorised trades of its agent, TBY, who had actual or apparent

authority to deal with the plaintiff's monies in the trading account on behalf of the defendant (see paras 81, 93, 99–100).

(4) As the primary nature of the nexus between the plaintiff and the defendant was premised on contract it was not necessary to consider an alternative course of action in tort or breach of trust (see para 103).

(5) In order to ascertain the true losses suffered by the plaintiff in the present case, it was necessary to undertake the tedious task of reconciling the genuine orders placed by the plaintiff against the orders undertaken by TBY in the plaintiff's trading account. In effect, until a tracing exercise was carried out it was not possible to assess the plaintiff's losses with any degree of certainty. As such, an inquiry or assessment of damages was ordered to be undertaken to gauge or calculate the actual loss incurred by the plaintiff (see paras 106–109).

[Bahasa Malaysia summary

Pada 3 Mac 2004, plaintif telah membuka satu akaun dagangan saham ('akaun dagangan tersebut') dengan defendan, sebuah firma broker saham, bagi tujuan dagangan dalam Bursa Malaysia Securities' Bhd ('Bursa'). Akaun dagangan tersebut dioperasikan sepenuhnya oleh seorang yang bernama Teh Bee Yean ('TBY'), yang merupakan wakil penjual yang dikomisyenkan oleh defendan. TBY menerima perintah dan arahan daripada plaintif berkenaan dagangan-dagangan dalam Bursa. Adalah fakta yang tidak disangkal bahawa TBY telah menyalahgunakan akaun dagangan plaintif dengan menjalankan transaksi tanpa kebenaran plaintif, iaitu dengan menjalankan dagangan yang mana dia tidak menerima arahan dan gagal untuk menjalankan dagangan yang mana dia dibenarkan untuk di jalankan. Akibat penyalahgunaan akaun dagangan tersebut, kini tiada saham dalam akaun dagangan plaintif dan wang yang didakwa oleh plaintif telah didepositkan bagi tujuan akaun dagangan telah hilang. Plaintif melaporkan tindakan tanpa kebenaran TBY kepada defendan. Satu siasatan yang dijalankan oleh defendan menunjukkan bahawa TBY telah menggunakan akaun dagangan saham plaintif untuk menjalankan perdagangan saham peribadinya tanpa pengetahuan kakitangan pengurusan defendan. Walau bagaimanapun defendan menegaskan bahawa ia tidak bertanggungan atas penipuan atau tindakan TBY yang tidak jujur. Secara ringkasnya, defendan menghujahkan bahawa TBY bukan pekerjanya dan dengan itu, ia tidak bertanggungan secara vikarius terhadap tindakan-tindakan TBY yang tidak jujur. Plaintif memfailkan satu tindakan terhadap defendan berdasarkan, secara pelbagai dan alternatif, pelanggaran kontrak, tort dan pecah amanah bagi kerugian yang dialaminya. Tuntutan plaintif berjumlah sebanyak RM1,937,207.90 adalah bagi wang yang mana plaintif mendakwa telah didepositkan kepada defendan sebagai bayaran bagi saham-saham, sedangkan saham-saham tersebut tidak dibeli oleh TBY. Pada dasarnya, adalah menjadi kes plaintif bahawa dia telah mengakujanji bagi dagangan saham-saham melalui defendan dan bahawa, dengan itu, defendan

bertanggungjawab bagi kerugian sebanyak RM1,937,207.90 tersebut. Plaintif menghujahkan bahawa oleh kerana TBY, yang telah berkhidmat di bahawa arahan dan pengawasan defendan di premis mereka, adalah pada setiap masa material seorang ejen kepada defendan, defendan bertanggungjawab bagi tindakan-tindakan TBY yang mana tidak patuh pada etika profesional. Defendan menafikan liabiliti ke atas ketidakjujuran TBY dan menegaskan bahawa TBY adalah ejen plaintif bagi tujuan menjalankan perdagangan saham.

Diputuskan, membenarkan tuntutan plaintif dengan kos sebanyak RM45,000:

(1) Hubungan antara plaintif dan defendan tertakluk kepada perjanjian yang dimeterai antara kedua-dua mereka pada 3 Mac 2004, iaitu borang permohonan akaun dagangan saham yang dimeterai oleh pihak-pihak apabila plaintif membuka akaun dagangan saham dengan defendan. Terma-terma seperti terkandung dalam borang permohonan perdagangan saham mengandungi perjanjian utama atau kontrak antara plaintif dan defendan. Oleh kerana hubungan utama bagi tujuan perdagangan saham adalah antara plaintif dan defendan, defendan dan TBY membentuk satu entiti bersama. Dalam kata lain, wakil penjual tidak boleh dibahagi. Setakat mana pelanggan plaintif adalah terlibat, TBY adalah ejen defendan dan adalah palsu untuk membuat perbezaan antara fungsi dan tanggungjawab TBY dan defendan. Walaupun TBY adalah ejen plaintif bagi tujuan terhad untuk mengambil dan menjalankan perdagangan atas arahan plaintif, ini tidak dan tidak boleh mengurangkan fakta bahawa ketika TBY menjalankan perdagangan melalui Bursa, dia bertindak sedemikian sebagai ejen defendan (lihat perenggan 68–69 & 75).

(2) Melihat pada kontrak utama antara plaintif dan defendan dan fakta yang tidak disangkal bahawa TBY menyalahgunakan akaun dagangan plaintif dengan menjalankan perdagangan yang tidak dibenarkan, dengan itu defendan sebagai prinsipal TBY bertanggungan berbuat sedemikian. Selanjutnya, tiada keterangan yang menunjukkan bahawa plaintif berpakat dengan TBY secara sulit atau bahawa dia sedar dan dengan itu mengesahkan perdagangan-perdagangan yang tidak dibenarkan tersebut, untuk membenarkan estopel mengambil tempat. Berdasarkan keterangan, adalah jelas bahawa plaintif adalah pihak yang tidak bersalah, yang telah memberi kepercayaan penuh kepada pengendalian urusan perdagangan sahamnya kepada TBY. Dalam hal keadaan ini, defendan bertanggungan dalam kontrak bagi tindakan-tindakan penipuan dan yang tidak dibenarkan oleh ejennya, TBY (lihat perenggan 29, 84–89).

(3) Secara alternatifnya, defendan sebagai prinsipal adalah bertanggungan bagi tindakan ejennya, TBY, berkenaan plaintif. Dalam menjalankan

perdagangan dalam akaun dagangan plaintif sebagai ejen defendan, TBY bertindak dalam skop tanggungjawabnya sebagai wakil penjual. Hingga peringkat tersebut, boleh dikatakan bahawa TBY bertindak dalam skop autoriti jelasnya, walaupun secara tidak jujur, takat mana plaintif dan defendan adalah berkenaan. Defendan bertanggungan bagi tindakan-tindakan ejennya yang tidak jujur atau tidak dibenarkan, TBY, yang mana mempunyai autoriti sebenar atau jelas untuk mengurus wang plaintif dalam akaun dagangan bagi pihak defendan (lihat perenggan 81, 93, 99–100).

(4) Oleh kerana sifat utama hubungan plaintif dan defendan adalah berasaskan kontrak, adalah perlu untuk mempertimbangkan tindakan dalam tort atau pemecahan amanah (lihat perenggan 103).

(5) Untuk menentukan kerugian sebenar yang dialami oleh plaintif dalam kes ini, adalah perlu untuk mengaku janji tugas remeh mendamaikan perintah-perintah asal yang ditetapkan oleh plaintif terhadap perintah-perintah yang diakujanji oleh TBY dalam akaun dagangan plaintif. Secara kuatkuasanya, hinggalah langkah mengesan dijalankan, adalah tidak mungkin untuk menaksir kerugian plaintif dengan apa-apa tahap kepastian. Dengan itu, satu siasatan atau taksiran kerugian diperintahkan untuk diakujanji bagi menghitung atau mengira kerugian sebenar yang dialami oleh plaintif (lihat perenggan 106–107).]

Notes

For cases on principal and agent, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2923–2928.

Cases referred to

Chien Chung Ming v Kay Hian & Co Pte & Anor [1992] 4 CLJ (Rep) 366, HC (refd)
Lloyd (Pauper) v Grace, Smith & Co [1912] AC 716, HL (refd)
Powell v Wontner & Renwick (a firm) Solicitors Journal Vol 106 p 197 (refd)
RHB-Cathay Securities Pte Ltd v Ibrahim Khan and other actions [1999] 3 SLR 464, HC (folld)

Legislation referred to

Contracts Act 1950 s 190

Chong Loong Men (Lim Chong Phang & Amy) for the plaintiff.
Chan Kok Koong (Samuri Tan with him) (Shook Lin & Bok) for the defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] The plaintiff's claim against the defendant here, a stockbroking firm is

for losses he claims to have suffered as a consequence of the misuse of his share trading account with the defendant. The said trading account was, for the purposes of this action, operated wholly by a dealer's representative known as one Teh Bee Yean ('Ms Teh'). Ms Teh was at all material times a commissioned dealer's representative with the defendant. Ms Teh took orders and directions from the plaintiff in respect of his trades on the Bursa through the defendant. It is not in dispute that Ms Teh did misuse the plaintiff's account, resulting in the current losses. The quantum of the plaintiff's claim, which is premised variously and alternatively on breach of contract, tort and breach of trust against the defendant, is in the sum of RM3,393,994.09.

[2] As a consequence of the misuse of the trading account, there are now no shares remaining in the plaintiff's trading account. Monies in the sum of RM1,937,207.90 which the plaintiff claims to have deposited for the purposes of the trading account are missing, as is the sum of RM1,456,786.10 paid directly to Ms Teh. In essence the plaintiff's claim is premised on the footing that the defendant is liable for the losses occasioned directly by Ms Teh's unauthorised acts.

THE TRIAL

[3] The trial of this action took place over the course of a day. It was considerably abbreviated by the fact that the misuse of the plaintiff's account by Ms Teh was not in issue. The parties agreed on the basic chronology of events. It was also agreed that with respect to all documents produced at trial, the makers would be dispensed with, but the contents would remain in dispute. As such it was not necessary to mark each and every document as an exhibit. The bundles were instead collectively marked on the understanding that they would be treated as 'Part B' documents. However counsel were also advised at the outset of trial that it remained open to them to object to any particular document at any point in time during the course of the trial whereupon a ruling on the evidence would be delivered.

[4] The plaintiff himself testified in Mandarin, with the assistance of an interpreter. One other witness testified for the plaintiff, namely his wife, Wong Ooi Wei. The defendant called one witness, namely Lim Jit Seng, the head of operations of the defendant ('DW1').

SALIENT FACTS

The plaintiff's case

[5] The plaintiff opened a share trading account with the defendant on 3 March 2004 under client code Trading Account No ZYA0606 ('the trading

account'). The plaintiff's trading account opening form or application form dated 3 March 2004 was submitted to the defendant by the plaintiff's former dealer's representative, one Tan Teik Weng. Upon acceptance by the defendant, this document comprised the primary contract between the plaintiff and defendant.

[6] In or around January 2006, Tan Teik Weng ceased to be the plaintiff's dealer's representative. After this date the plaintiff's trades on the Bursa were conducted by or through Ms Teh.

[7] As stated at the outset Ms Teh was a commissioned dealer's representative under a contract with the defendant. The terms of Ms Teh's agency with the defendant is governed by a contract termed a 'standard remisier's contract' dated 29 June 1999. As a commissioned dealer's representative she was at all material times an agent of the defendant for the purposes of conducting trades on behalf of the plaintiff on the stock exchange, ie Bursa. To that extent she wore two 'hats' as it were: The plaintiff's agent for the limited purpose of taking orders and executing (authorised) trades at the behest of, and on the direction of the plaintiff. In other words she was the plaintiff's agent for the purposes of taking the plaintiff's express instructions in relation to trades to be conducted on his behalf on the stock exchange; however she was at all times the agent of the defendant under the standard remisier's contract, for the purposes of executing the plaintiff's trades which pass through Bursa Malaysia Securities Berhad's trading engine. In other words the trades could not be conducted by Ms Teh without her being a dealer's representative with the defendant.

[8] It is of significance to note that the entirety of the plaintiff's relationship with the defendant is governed by the terms of the share trading account contained in the share trading application form, which therefore comprises the primary agreement or contract between the plaintiff and the defendant. It is important to underscore the fact that it is the defendant who contracted with the plaintiff to execute trades on the plaintiff's behalf, on the stock exchange. It is not the defendant's dealer's representative who contracted with the plaintiff for this purpose.

[9] It is significant that while the plaintiff maintains that Ms Teh was 'assigned' to him by the defendant, the defendant refutes this, pointing out that the defendant is not involved in the process of selecting or assigning dealer's representatives for the plaintiff. The defendant maintains that it was the plaintiffs former dealer's representative, Tan Teik Weng who assigned the operation of all trading accounts managed by him to Ms Teh. There is no dispute that the plaintiff willingly acceded to having Ms Teh as his dealer's representative from 2006 onwards.

[10] To this end the plaintiff testified that in or around 2008 or 2009, Ms Teh called him on the telephone and introduced herself as the replacement dealer's representative in view of Tan Teik Weng's resignation. The plaintiff had no objections.

[11] It would appear that there were no problems with the plaintiff's trading account from 2006–2009.

[12] In or around March 2009, the plaintiff testified that Ms Teh advised him that as he could not read English, and therefore could not understand the contents of letters and documents issued by the defendant and the Bursa Central Depository, she herself would assist him by filing and recording the various letters and documents from the defendant as well as the Bursa Central Depository and keep him advised of their contents.

[13] To this end, Ms Teh procured the plaintiff's consent to a change of correspondence address from his home address to her residential address at Bock 3-2-B Desa Dua Apartment, Lorong D1/5 Desa Aman Puri, Kepong, 52100 Kuala Lumpur. The plaintiff signed an application form for the updating of his account particulars on 23 March 2009 with both the defendant and the Bursa Central Depository, to effect the aforesaid change.

[14] The change of the plaintiff's address and account particulars were mailed to the plaintiff at his old address, ie his own residential address as well as to the new address. This served to confirm with the plaintiff that the change of address sought, had been effected. The plaintiff did not object to this change of address because he had agreed to Ms Teh's suggestion that she maintain all records of letters, albeit from the defendant or the Malaysian Central Depository herself, and explain the contents to him. In short, it is clear that the plaintiff trusted Ms Teh implicitly.

[15] Between 2009 to 2012, Ms Teh carried out all share sale and purchase transactions in the plaintiff's trading account. According to the plaintiff, during this time, he invested a total of RM3,393,994.09 in share trading. He testified that he had invested this sum in stages by way of a direct transfer of funds or by way of banking in funds as follows:

(a) a sum of RM1,937,207.90 was banked in to the defendant's general collection account, or as he put it, directly with the defendant; and

(b) a sum of RM1,456,786.19 was paid directly to Ms Teh for the purposes of share trading

Monies deposited by way of cash in the defendant's general collection account

[16] In support of item (i), the plaintiff relies on cash deposit slips in relation

to monies which were placed directly into the defendant's general collection account. The cash deposit slips, numbering 64, are exhibited in the documents produced by the plaintiff in support of his claim. The plaintiff maintained that he made these payments, upon request by Ms Teh, believing that the monies would be held in trust by the defendant and utilised for the purchase of shares which would also be held in trust by the defendant for his benefit.

[17] Of these 64 cash deposit slips, the defendant verified after investigation that 56 cash deposit slips were indeed paid into the general collection account No 3077509901 amounting in total to RM1,484,848.20. The defendant could not trace the eight other deposits.

[18] However the defendant, through DW1, maintained that this general account, maintained by the defendant and bearing account No 3077509901, is a general collection account used by all of the defendant's customers for the purposes of depositing funds for their individual trading accounts. All customers of the defendant deposit monies in this general collection account. The defendant can only identify the ownership of such funds on the basis of instructions given by the respective clients' dealer's representatives, who will stake claim to the monies of their respective clients. As such the defendant maintains, through DW1, that it was not possible to identify, at the time, how much monies were deposited by the plaintiff in the general collection account, particularly as he made cash deposits, which were utilised.

Monies paid by the plaintiff directly to Ms Teh

[19] With respect to item (ii), the plaintiff testified that he paid, over a period of three years a sum of RM1,456,786.19 directly to Ms Teh in cash. The reason he gave for handing over such large sums of money in cash to her were that Ms Teh had informed him that she had made payments for share trades on his behalf and required repayment. He was persuaded to do so because he did not have enough time to deposit monies for the purposes of such purchases.

[20] The plaintiff testified that throughout this period from 2009 to 2012, he did not make any withdrawals from his investment account.

Mode of trading

[21] The plaintiff testified that he would give instructions for the purchase or sale of share in his account directly to Ms Teh by telephone. Initially he testified that he would call her at the office but soon took to calling her on her hand phone to give her instructions. On occasion his wife, PW2, would also give instructions to Ms Teh, more particularly in relation to the payment of deposits into the general account etc.

[22] In the course of trial, the plaintiff produced a voluminous set of documents which contained facsimile transmissions sent to him by Ms Teh on virtually a daily basis to keep him and his wife updated on the status of purchases and sales made by him on his account. These facsimile transmissions bore as headers the telephone number of Ms Teh's contract line in the defendant. Many of these facsimiles were addressed to one 'Dee' with messages. PW2, the plaintiff's wife in the course of her testimony advised that this name 'Dee' referred to her. According to PW2, Ms Teh referred to her as 'Dee'. It is immediately apparent from a consideration of this voluminous documentation that the plaintiff and his wife were kept advised of the status of their share trading account by Ms Teh solely through these facsimile transmissions. At no stage did either the plaintiff or his wife seek to compare these facsimile transmissions with the original contract notes, monthly statements from the defendant or the monthly statements issued by the independent Bursa Malaysia Depository. Needless to say these facsimile transmissions were almost entirely inaccurate or false.

Discovery of the unauthorised trading

[23] Towards the end of 2012, the plaintiff, believing that there might well be a decline in the performance of the stock exchange given the imminent elections, decided to sell a portion of his shares and retain the share proceeds in cash by way of savings.

[24] He then proceeded to conduct an examination of his investment account with the defendant whereupon he found that there were neither shares nor proceeds of sale of shares in his account. On 24 September 2012, the plaintiff, his brother in law, one Daniel Wong and the plaintiff's wife, Ms Wong Ooi Wei attended at the defendant's offices and lodged a complaint to the effect that Ms Teh had manipulated the plaintiff's account and that the plaintiff's shares in the Bursa Malaysia Depository and funds in the plaintiff's account were missing. According to DW1 the plaintiff discovered this when he asked Ms Teh to withdraw some monies from his account but she was unable to do so. DW1 further testified that the plaintiff had advised them that Ms Teh confessed that she had misused the plaintiff's trading account.

[25] According to the plaintiff, the defendant undertook to investigate the matter after confirming that there were no more funds in the plaintiff's trust account. After such investigation two more meetings were held with the plaintiff, his wife and his brother-in-law on 1 October 2012 and 8 October 2012. The defendant's investigation revealed, according to DW1, the following matters:

(a) the defendant confirmed that the plaintiff had given monies directly to Ms Teh which were duly banked into her personal account;

(b) Ms Teh appeared to have been allowed by the plaintiff to operate his account freely;

(c) the defendant could not identify whether the monies deposited with Ms Teh were in fact subsequently deposited with the plaintiff because the defendant had simply no access to Ms Teh's account;

(d) as for monies deposited directly with the defendant, as explained above, these monies were deposited into a general collection account N o 3077609901. This account is meant for customers of the defendant to deposit monies for the settlement of their trades. The defendant was unable to identify which particular client deposited the monies, unless Ms Teh as the plaintiff's dealer's representative, directed or instructed the defendant to appropriate these monies to the plaintiff's account;

(e) the misuse of the plaintiff's share trading account appeared to have occurred following the change of the plaintiff's correspondence address to Ms Teh's personal address, a matter to which the plaintiff freely consented; and

(f) the defendant maintained that it had no knowledge or information of Ms Teh's unauthorised actions and had neither authorised nor approved nor condoned the same.

[26] The plaintiff stated in the course of his evidence that he had shown the defendant's officer, one Ms Natalie Wee the transaction chart that had been prepared by Ms Teh. Ms Wee then highlighted the 'buy' transactions on Ms Teh's chart/list in green and the 'sell' transactions in yellow. Those transactions which were not highlighted were never transacted according to Ms Wee. Ms Wee also gave the plaintiff a copy of his statements from January 2009 to August 2012.

[27] The plaintiff also insisted that he retained a keen interest in his investment. To this end, according to him Ms Teh brought contract notes and Bursa Malaysia Depository statements to evidence trades undertaken on his behalf and for his benefit. He produced these contract notes and statements. Most of these contract notes were forged. She also faxed over reports of trades undertaken on his behalf on days when he placed orders for the purchase or sale of shares. He produced a voluminous bundle of facsimile correspondence to this end.

The plaintiff

[28] I found that the plaintiff withstood cross-examination credibly and his account of events remained relatively untouched, save in relation to the facsimile transmissions that had been faxed over to him on virtually a daily

basis. When shown these documents and asked who 'Dee' was, he maintained that he did not know. After re-examination, upon being questioned by the court as to how he placed orders, if he was not conversant with the names of the various stocks, he responded by stating that he knew the names of a few of the stocks but largely placed orders by relying on stock codes. In other words he would instruct Ms Teh in Cantonese to place orders for stocks on the basis of their stock numbers. When the court asked him whether his wife also participated in dealing with Ms Teh on the issue of instructions for stocks, he responded that she assisted him by interpreting the facsimile transmissions that were sent to him by Ms Teh at the end of trading. He did however state in the course of his evidence that his wife maintained an account of all monies deposited with the defendant.

[29] Taken as a whole however it was clear that the plaintiff was an innocent party who had entrusted the entirety of the operations of his share investment dealing to Ms Teh. There was no evidence to suggest that he had at any stage up to September 2012, been aware of the unauthorised trading undertaken by Ms Teh in his share trading account. It was also equally clear that Ms Teh was able to mislead the plaintiff relatively easily in view of his lack of knowledge of written and spoken English.

[30] As a consequence of the plaintiff's evidence in relation to the mysterious 'Dee', learned counsel for the plaintiff opted to call a further witness for the plaintiff, namely the plaintiff's wife, Wong Ooi Wei ('PW2'). PW2 referred to the voluminous facsimile documentation that had been faxed to the plaintiff on each occasion when trades were carried out for the plaintiff and confirmed that she was the person referred to as 'Dee'. She stated that only Ms Teh called her 'Dee'. She further confirmed that she too, had an account with the defendant and that Ms Teh was her dealer's representative as well. PW2 also confirmed that when she received the summarisation of trades from Ms Teh she did look through them to ensure that they were accurate, although this exercise was not undertaken in any detail.

[31] In essence, the plaintiff maintained that as far as he was concerned he had undertaken these share trades through the defendant and therefore the defendant was ultimately responsible for the losses he had suffered. He pointed to Ms Teh's standard remisier's agreement and maintained that as a commissioned dealer's representative, Ms Teh was at all material times the defendant's agent. She worked under the direction and supervision of the defendant on their premises. Accordingly the defendant was responsible for Ms Teh's acts of misfeasance.

[32] Notwithstanding that this is an issue of law, the plaintiff purported to reiterate strenuously in his witness statement that Ms Teh was at no times his

agent. The plaintiff then closed its case.

The defendant's case

[33] The defendant called one witness in support of its case, namely Mr Lim Jit Seng, DW1 ('DW1'). At all material times he was the head of operations of the defendant.

[34] DW1 maintained that Ms Teh was in fact at all material times the plaintiff's agent in so far as the carrying out of the plaintiff's trading instructions and matters concerning trades was concerned. DW1 also stated that dealer's representatives such as Ms Teh who are under commissioned terms with the defendant are not assigned clients by the defendant, as would be the case with regards to salaried dealer's representatives who are employees of the defendant. Commissioned dealer's representatives have to source their own clients. In other words the defendant maintained that it did not specifically assign the plaintiff to Ms Teh.

[35] DW1 also pointed to the salient terms of Ms Teh's dealer's representative's agreement which provided, inter alia, that:

(a) Ms Teh would accept and execute orders placed by and/or received from clients for the purchase and sale of securities upon the terms set out in the 'Remisier's agreement';

(b) the defendant would pay Ms Teh a commission out of the brokerage charged to clients on transactions dealt with by or through Ms Teh;

(c) Ms Teh agreed and undertook not to commit any fraud, dishonesty, deceit, misdeed or practice any deception in connection with dealings with her clients; and

(d) Ms Teh would not trade under the name of the defendant as principal.

[36] In short the defendant, through DW1 denied liability for Ms Teh's dishonesty maintaining that she was the plaintiff's agent for the purposes of executing share trades and more significantly that she had exceeded her authorisation in committing fraud and that the defendant was therefore not liable for her fraudulent or dishonest acts. The distinction sought to be made by the defendant is that Ms Teh is not an employee and as such the defendant is not vicariously liable for her dishonest acts.

[37] The defendant further pointed to the voluminous statements and contract notes which had been posted, at the defendant's behest, to Ms Teh's residential address which bore proof of the trades that had been executed in his share trading account. The giving of contract notes and monthly statements

(which had been manipulated) personally by Ms Teh to the plaintiff was never authorised or condoned by the defendant.

[38] DW1 also referred to the individual trading account form or agreement between the plaintiff and the defendant dated 3 March 2004. He pointed to the salient clauses which provided, inter alia, as follows:

(a) that at the plaintiff's request, the dealer's representative is authorised to trade in securities and that the plaintiff agrees to abide by the rules of the same;

(b) the plaintiff agrees that all contract notes, contra statements and monthly statements generated by the defendant are deemed to be final conclusive and binding on him if the defendant fails to receive any objection in writing within five trading days; however the plaintiff is at liberty to advise of any errors in such documents at any time;

(c) The plaintiff's oral or written instructions are deemed to be confirmed as soon as they are acted upon by the dealer's representative and any such executed instructions are not to be revoked or withdrawn by the plaintiff.

[39] Although not expressly stated, it is evident that all such matters are binding on the plaintiff provided they are actually authorised by him.

[40] DW1 then went on to explain how Ms Teh became a remisier with the defendant. The salient terms of Ms Teh's dealer's representative agreement with the defendant (as stated above) were then highlighted.

[41] DW1 referred to the change in address voluntarily sought by the plaintiff on 23 March 2009. The new address happened to be Ms Teh's address although it is not in issue that the defendant was not aware of this at the point in time when the address was changed. The fact of the change in address was also notified to the plaintiff at the old address.

[42] After this date, ie 23 March 2009, all documentation generated in relation to trading in the plaintiff's account was sent to the new address.

[43] Thereafter the defendant only became aware of the irregularities in the plaintiff's account some three years later, in September 2012, when the plaintiff made a complaint.

[44] In the course of cross-examination, DW1 conceded that Ms Teh earned commissions and incentives based on targets achieved, held a business card printed by the defendant, and received support from the defendant in relation to the renewal of her dealer's representative's licence. DW1 also agreed that Ms

Teh was at all material times the relationship between the parties, ie Ms Teh and the defendant was one of agent and principal respectively. He also agreed that the plaintiff is the defendant's client. However he disagreed that the defendant assigned Ms Teh to the plaintiff maintaining that the previous dealer's representative had passed on his clients to Ms Teh. DW1 stated that the defendant only assigned clients to its 'salaried' dealer's representatives. However he admitted that Ms Teh would not be able to deal with the plaintiff's account without the defendant's consent.

[45] DW1 was asked whether any legal action was taken against Teh whereupon he responded that this was yet to be done. Neither had the defendant filed a police report. DW1 explained that this was so because the plaintiff had already done so.

[46] It was also suggested to DW1 that Ms Teh was not the only one involved in the unauthorised trades undertaken in the plaintiff's account, to which suggestion he disagreed.

[47] DW1 was then shown copies of a series of monthly statements issued by Bursa Malaysia Depository Sdn Bhd to the plaintiff at Ms Teh's address for the period between 1 May 2010 until 1 July 2012. DW1 was asked whether these monthly statements reflected authorised trades. DW1 was unable to verify this.

[48] DW1 was then shown copies of contract notes bearing the defendant's logo and asked whether these were in fact genuine. He confirmed and identified the genuine contract notes and identified a greater stack of contract notes from the entire bundle as being false or fictitious. He conceded that there were no material differences between the genuine contract notes and fictitious ones. All the contract notes bore the defendant's identity and logo. When it was suggested that all these contract notes were generated by the defendant, DW1 disagreed.

[49] It was suggested to DW1 that if indeed there was any falsification of contract notes this could only have been carried out with the assistance of the back room operations of the defendant. DW1 disagreed. He also confirmed that the defendant's internal audit investigation had failed to uncover precisely how the falsification took place.

[50] It was further suggested that the alteration of the plaintiff's mailing address to Ms Teh's home address ought to have raised a 'red flag' and warned the defendant that something was amiss. However DW1 maintained that at the point in time when the address was changed the defendant was not aware nor could be aware that the plaintiff's mailing address had been altered to Ms Teh's address. Given the voluntary nature of the change of address it had been

dealt with administratively without giving rise to any concern. DW1 also maintained that the defendant had an internal audit division which worked to ensure compliance and to avoid fraud where possible.

[51] DW1 was then questioned about the monies deposited by the plaintiff in the defendant's general collection account. He confirmed that all of the monies so deposited had been cleared from that account. Of the total deposited, some RM490,000 odd went to the plaintiff's account while the rest of plaintiffs monies were allocated to other trading accounts at Ms Teh's behest.

[52] DW1 went on to explain that all clients' monies are deposited into this general collection account. Then the respective clients' dealer's representatives would fill in banking in slip forms stipulating that their client had banked monies into the general account. Upon the defendant receiving this notification, they would verify the receipt of such monies and then allocate the monies as indicated by the dealer's representative. In the instant case involving the plaintiff, payments were made in cash. The plaintiff did not furnish banking in slips. As such the defendant acted on Ms Teh's directions. DW1 explained that the control in a system like this is that a client would complain if monies were not correctly allocated for the purpose stipulated. However in the instant case, in view of all documents being addressed to Ms Teh, the plaintiff remained unaware of the true status of his account, and no complaint was lodged.

[53] DW1 was asked about where the monies deposited by the plaintiff had gone and who ultimately utilised the plaintiff's monies. DW1 could only refer to the investigation report stating that he had no further details. It is not possible from the investigation report to ascertain precisely how the plaintiff's monies had been allocated or utilised. In other words, a forensic tracing is extremely difficult because Ms Teh had traded for herself and had also allocated some monies to several other accounts.

[54] Finally DW1 was queried about documents produced by the defendant which showed several withdrawals in favour of the plaintiff. Again all these withdrawals from the plaintiff's trust account were directed or instructed by Ms Teh. A total ten withdrawals between February 2010 and August 2012 were shown where Ms Teh had directed that various sums of money ranging from RM1,476.10 to RM70.044.30 had been withdrawn in favour of the plaintiff. The plaintiff however denied receipt of three of these cheques whilst admitting that he had received the other sums by way of cheque. All these withdrawals were made available in the plaintiff's name by way of cheques. There was no explanation available as to why the plaintiff did not receive three of these

withdrawal payments. When DW1 was asked whether the defendant had sought to procure copy images of these cheques he stated that the defendant had not.

[55] In summary, I found DW1 to be a truthful and credible witness. However it was also apparent that the defendant had taken no real initiative to investigate the precise manner in which these unauthorised trades were perpetrated by Ms Teh, so as to explain to the plaintiff how these unauthorised trades and thereby his losses had arisen.

The investigation report

[56] In the course of cross-examination, DW1 testified that the defendant had carried out an investigation into the irregularities and unauthorised trading in the plaintiff's trading account. An investigation report was produced by the defendant's internal auditors and produced in court. The said report was duly admitted in evidence and learned counsel for the plaintiff accorded an opportunity to cross-examine DW1 on the same.

[57] The investigation report detailed the fact that during the investigating auditors' interview with Ms Teh on 24 September 2012 and 26 September 2012, Ms Teh admitted that she had not carried out the plaintiff's instructions to buy shares although he had given her the money to purchase the same. Neither had she sold his shares as directed. She further admitted that she had used Yap's share trading account to perform personal trading of shares. However these unauthorised trades had been performed by her without the knowledge of the defendant's management personnel.

[58] The report further specifies that Ms Teh admitted selling the plaintiff's shares without his knowledge to pay for contra losses which she had incurred in her personal trading utilising the plaintiff's account. To this end, she admitted giving the plaintiff falsified Bursa statements, falsified contract notes and transaction reports which she had prepared manually and which were also inaccurate.

[59] The audit findings included the following matters:

(a) the status of the plaintiff's CDS and trust account balances from the Central Depository System Balance Details of Bursa Malaysia and monthly statements of Bursa Malaysia revealed a nil balance in the plaintiff's account;

(b) there were a total of 4,051 transactions undertaken in the plaintiff's account, involving 475 counters with a total contract value of

RM74,472,397.73. Of these transactions 2,013 were purchase transactions and 2,038 sale transactions;

(c) a total of 96 photocopies of transaction slips for the period between February 2009 and September 2012 totalling RM2,765,646.24 were furnished by PW2 to the defendant on 3 October 2012. These were deposit transactions into both the defendant's collection account as well as Ms Teh's personal savings account. The auditors' checking of the details of banking slip forms completed by Ms Teh for the funds deposited by the plaintiff into the defendant's collection account revealed that Ms Teh instructed or indicated that such proceeds belonging to the plaintiff were utilised, inter alia, as follows:

(i) RM489,984 was paid either into the plaintiff's trust account or for contra losses or to pick up shares;

(ii) RM33,567.18 were paid into PW2's account or utilised for payment for contra losses;

(iii) RM934,128.78 was paid into other clients' trust accounts;

(d) On matching the date of transaction (with a T+3 grace period for settlement) against the amount indicated as having been deposited by the plaintiff on his transaction slips and compared against the plaintiff's respective monthly statement as well as the 'falsified' or fictitious transaction report manually prepared by Ms Teh which she gave to the plaintiff, it transpires that only two of the transactions matched. These were two purchase transactions conducted in January 2011. However these shares were sold subsequently but the auditors were unable to ascertain whether this was on Yap's instructions or otherwise;

(e) the auditors were unable to ascertain which of the trades reflected in the plaintiff's genuine daily transaction report were actually authorised by him or belonged to him and which of the trades had been transacted by Teh without authorisation because Ms Teh had utilised the plaintiff's share trading account for her personal trading; and

(f) the auditors concluded that they could not verify the plaintiff's claim of a loss of RM3.2m worth of shares because:

(a) Ms Teh had utilised the plaintiff's account for her own personal benefit;

(b) the auditors were unable to ascertain or identify the actual shares purchased utilising the funds deposited by the plaintiff into the defendant's general account;

(c) the auditors were unable to verify the purpose of the plaintiff depositing funds into Ms Teh's savings account and whether those funds were meant for the purchasing of shares for his account.

[60] The defendant having called DW1 and produced the investigation report, closed its case. A

Losses claimed by the plaintiff

[61] The plaintiff maintained that it was difficult for him to compute the losses he had suffered based on the losses or gains from unauthorised transactions as compared to the balance that would have been in his account if only the authorised transactions had been undertaken. B

[62] He was unable to assess or estimate the trades that he had authorised over the years. He pleaded a lack of education in this respect. He therefore maintained that as he was unable to assess his losses with any degree of certainty but as it was not disputed that his trading account had been 'cleared out' as a consequence of the defendant's or its agent's acts and omissions, the losses he claimed were the total quantum of monies he had deposited with the defendant. C D

[63] The defendant on the other hand maintains that although there were admittedly unauthorised trades carried out in the plaintiff's account, this does not detract from the fact that he did in fact trade on the account. To that end the defendant disputes the plaintiff's claim that he is entitled to a return of the entirety of his investment. In other words, the defendant maintains that in view of the trading undertaken by the plaintiff, he cannot expect the monies that he deposited in the trading account to have remained at the same level. The defendant maintains through DW1 that heavy trading losses were incurred and that the plaintiff cannot therefore expect to make claim for RM3,393,994.09. E F

[64] The defendant finally points to the fact that the plaintiff has made a claim against the compensation fund of Bursa Malaysia Securities Bhd based on the same unauthorised transactions which comprise the subject matter of this suit. To this end the defendant maintains that the plaintiff ought not to bring this claim against the defendant if he has received compensation from Bursa Securities Malaysia Bhd as his rights to any legal proceedings would have been subrogated to Bursa. However the plaintiff testified that he had received no compensation from Bursa. G H

[65] After the close of the case and at the outset of submissions, learned counsel for the plaintiff advised the court that the plaintiff would not be pursuing his claim for the sum of RM1,456,786.19 which he had paid directly to Ms Teh for the purposes of share trading. As such, the plaintiff's claim against the defendant is reduced to the sum of RM1,937,207.90 which the plaintiff deposited with the defendant for the purposes of trading in shares to I

be conducted by Ms Teh.

ISSUES

[66] The issues that arise for consideration are as follows:

(a) what is the nature of the relationship between the plaintiff, the defendant and Ms Teh?

(b) is the defendant liable for the dishonest acts, ie the unauthorised trading of Ms Teh vis-a-vis the plaintiff? As the defendant and Ms Teh enjoy the relationship of principal and agent respectively under the standard remisier's agreement, what are the consequences for the defendant, ie the principal, of Ms Teh, the agent, having carried out unauthorised trades in the plaintiffs, ie the third party's trading account?

(c) is the defendant liable in tort or breach of trust?

(d) what are the losses suffered by the plaintiff?

Issue (i): What is the nature of the relationship between the plaintiff, the defendant and Ms Teh?

[67] The relationship between the parties will be considered in turn:

(a) The relationship between the plaintiff and the defendant.

[68] The relationship between the plaintiff and the defendant is governed by the agreement entered into between them on 3 March 2004, namely as contained in the share trading application form. At the end of that document the plaintiff has annexed his signature, indicating his consent to the terms and conditions imposed upon him by the defendant for the purposes of trading on the Bursa through it. This document therefore governs the relationship between the plaintiff and the defendant. It is important to underscore again the fact that the contract is between the plaintiff and the defendant and not the plaintiff and Ms Teh.

[69] The terms as contained in the share trading application form, which have been accepted by the plaintiff, therefore comprises the primary agreement or contract between the plaintiff and the defendant. As provided for in that agreement, in consideration of a brokerage fee or commission and the plaintiff undertaking to abide by the relevant rules and regulations of securities trading, the defendant agreed to execute trades for the plaintiff on the Bursa. It is important to emphasise that under this primary contract, it is the defendant who contracts with the plaintiff to execute the plaintiff's orders for the

purchase and sale of shares on the Bursa. The defendant does so through its dealer's representative, Ms Teh. As such it is not Ms Teh who contracts expressly under the share trading agreement to execute trades on behalf of the plaintiff, but the defendant.

[70] It is also important to bear in mind that for the purposes of the actual execution of trades on the stock exchange, the defendant purchases shares on behalf of the plaintiff, as a principal from another broking house, the vendor, which also acts as a principal. In other words, the trades between the two broking houses are as between two principals, meaning that the purchasing broking house, as a principal, will be directly answerable or responsible to the selling broking house as principal for payment and settlement. The clients of the respective broking houses do not feature directly in this aspect. This is necessary for settlement purposes, as it is the broking houses that assume responsibility for all settlement issues. The brokers will look to their clients for repayment. This is crucial to ensure that the market proceeds in an orderly manner. If settlement were left to the individual purchasers or sellers and default arose this would be disruptive to the orderly functioning and progress of the market.

[71] However, for the purposes of the instant case, the contracting parties are plaintiff and the defendant whereby the defendant contracts to purchase and sell shares upon the plaintiff's express request in return for a fixed fee. As the primary relationship for the purposes of share trading is between the plaintiff and the defendant, it follows that in so far as the plaintiff is concerned, the defendant and Ms Teh comprise one unified entity. In other words, Ms Teh is, in this context, inextricably connected to, or indivisible from the defendant. The dealer is indivisible from the dealer's representative in so far as the plaintiff's requirement for the execution of authorised trades is concerned. Put another way, the dealer and the dealer's representative are indivisible vis-a-vis the plaintiff. The plaintiff would be unable to execute trades on the Bursa without contracting with the defendant. Equally the plaintiff would not be able to give instructions to Ms Teh about his proposed transactions if she were not a licensed dealer's representative and agent of the defendant. In so far as the plaintiff who is a client is concerned, it is artificial to seek to draw a distinction between the functions and duties of Ms Teh and the defendant. Ms Teh is the defendant's agent.

(b) The relationship between the plaintiff and Ms Teh

[72] As discussed above, Ms Teh is the defendant's dealer's representative who is allocated or assigned to the plaintiff, albeit by introduction from another dealer's representative or by the defendant directly.

[73] As a dealer's representative, Ms Teh's relationship with the plaintiff is

dependent to some extent on the nature of the activity undertaken. This is largely because of the unique nature of share trading. It is a business which necessitates a client's instructions being taken orally and acted upon, after which a contemporaneous statement in the form of a contract note is issued as evidence of the placement of such an order by the client.

[74] When therefore Ms Teh takes instructions from the plaintiff in relation to the purchase or sale of shares, she does, for a limited or finite time, assume the mantle of being the plaintiff's agent. This is because she is authorised by the plaintiff's direct and express instructions to effect a purchase or sale of shares on his behalf. Indeed this is precisely what the plaintiff has contracted to do with the defendant.

[75] However this does not and cannot detract from the fact that as and when she executes the trades through the engine of the Bursa, she does so as the defendant's agent. She executes a trade on behalf of the plaintiff through the defendant which then effects the purchase or sale as a principal with the matching broker or broking house as the other principal.

[76] To that extent therefore, Ms Teh, (as do all dealer's representatives) wore two 'hats' as it were: She was the plaintiff's agent for the limited purposes of taking orders and executing (authorised) trades at the behest of, and on the direction of the plaintiff; however she also at all times remained the agent of the defendant under the dealer's representative's contract, for the purposes of executing the plaintiff's trades which pass through Bursa Malaysia Securities Bhd's trading engine. In other words the trades could not be conducted by Ms Teh without her being a dealer's representative with the defendant.

(c) The relationship between the defendant and Ms Teh

[77] The defendant is the dealer or broking house while Ms Teh is the dealer's representative. In the instant case Ms Teh was a commissioned dealer's representative meaning that she was not an employee of the defendant but an agent of the defendant.

[78] The relationship between the plaintiff and the defendant is governed by the terms of the agreement entered into between them dated 29 June 1999 and termed the standard remisiers' agreement'.

[79] The salient terms of the agreement provide, inter alia, as follows:

Clause 2

2.1 In consideration of the premises set out and contained herein, the Company hereby appoints the Remisier and the Remisier hereby accepts the appointment as the Company's Commissioned Dealer's Representative and agent of the Company to:

2.1.1 deal in securities in the manner stipulated by the Company in the name of the Company and subject to dealing guidelines stipulated by the Company;

2.1.2 accept and execute orders placed by and/or received from Client(s) for the purchase and/or sale of securities, upon the terms and the conditions set out herein;

Client is defined as 'all person(s) having an account/accounts with the Company under the codes allocated and assigned to the Remisier by the Company whether or not recommended to the Remisier and/or personally known to him and duly accepted by both parties hereto';

[80] It is evident from a perusal of the foregoing as well as the terms of the agreement between Ms Teh and the defendant that she was at all material times an agent of the defendant who was authorised by the defendant to deal in securities and to accept and execute orders placed by, or received from, clients such as the plaintiff who has an account with the defendant under the code allocated and assigned to Ms Teh by the defendant.

[81] In so far as the plaintiff is concerned therefore, Ms Teh was authorised by the plaintiff to accept or receive orders from him, while Ms Teh was authorised by the defendant to deal in securities on behalf of or for the defendant. It will be recalled that the plaintiff was dealing in securities or share trading through the defendant. In executing trades in the plaintiff's account as an agent of the defendant therefore, Ms Teh was acting within the scope of her authority as a dealer's representative.

Issue (ii): Is the defendant liable for the dishonest acts, ie the unauthorised trading of Ms Teh vis-a-vis the plaintiff?

As the defendant and Ms Teh enjoy the relationship of principal and agent respectively under the commissioned dealer's representative's agreement what are the consequences for the defendant ie the principal, of Ms Teh, the agent, having carried out unauthorised trades in the plaintiff's, ie the third party's trading account?

[82] I have concluded under item (a) above that the relationship between the plaintiff and the defendant is governed by contract, whereby the plaintiff who

seeks to trade in shares contracts with the defendant who is the broker/dealer who enables the plaintiff to trade on the stock exchange, in consideration for a fee.

[83] It is evident from the contract between the plaintiff and the defendant that the defendant through its dealer's representatives is authorised to buy and sell shares on the express instructions of the plaintiff. It is equally evident, though not expressly stipulated that the defendant through its dealer's representative is only authorised to execute trades requested for by the plaintiff. In other words it is an implied term of the contract between the parties that the defendant only execute transactions which are expressly authorised by the plaintiff. If the defendant through its dealer's representative were to conduct any unauthorised transactions, ie transactions not expressly authorised by the plaintiff, this would amount to a clear and fundamental breach of the contract between the plaintiff and the defendant.

[84] As stated above in so far as the client, ie the plaintiff is concerned, in view of the primary contract between himself and the defendant, the dealer's representative and the defendant are one indivisible whole, such that the acts of the defendant's agent are inextricable from the defendant. The acts of the defendant's agent are the acts of the defendant in so far as the plaintiff is concerned, given that the primary contract for the purposes of share trading is between the plaintiff and the defendant.

[85] It therefore follows in the instant case, where it is not in dispute that Ms Teh misused the plaintiff's share trading account by carrying out unauthorised trades, that the defendant, as Ms Teh's principal is liable for the same. Ms Teh and the defendant are indistinguishable in so far as liability for the unauthorised trades is concerned given the present factual matrix. There is nothing in the evidence that suggests that the plaintiff at any stage colluded with Ms Teh or even that he was aware and somehow therefore ratified or affirmed the unauthorised trades, so as to allow estoppel to set in. It is not in dispute that at all material times the plaintiff had no knowledge that Ms Teh was undertaking such unauthorised acts. In the absence of actual knowledge, ratification, affirmation and estoppel do not arise. On the basis of the contract between the plaintiff and the defendant therefore, I have little hesitation in concluding that the defendant is indeed liable for the unauthorised trading undertaken by Ms Teh in the plaintiff's share trading account. Such liability arises from a simple breach of contract.

Is the defendant as principal liable for the acts of its agent vis-a-vis the third party, namely the plaintiff?

[86] Alternatively, and as is more often rationalised, this issue can be

considered from a tripartite view, namely whether the defendant as principal is liable for the dishonest or unauthorised acts of its agent, Ms Teh. In the course of considering this issue, it is necessary to comprehend the nature of the stockbroking business where share transactions are normally conducted orally, ie by telephone and confirmed by the issuance of contract notes. In this aspect I can do no better than to rely on the comprehensive summation of these matters in the well-known and oft-cited Singapore High Court case of *RHB-Cathay Securities Pte Ltd v Ibrahim Khan and other actions* [1999] 3 SLR 464. In that case the dealer or broker sought to recover contra losses from three of its clients who had defaulted. By way of defence the clients claimed that their dealer's representative had been guilty of carrying out unauthorised transactions, without their assent or consent. It was not in dispute that the dealer's representative there had been prosecuted for unauthorised trading. However the factual matrix of that case also disclosed that the three clients, upon becoming aware of unauthorised trading in their individual accounts had taken no steps whatsoever to regulate the matter or report the dealer's representative. They had merely mounted this defence when called upon by the stockbroking firm to make good the contra losses that had been incurred. In that case Chan Seng Onn JC stated, inter alia, as follows:

> 84 Before dealing with the issue of estoppel, it would in my view be appropriate to examine some of the implied obligations of the member companies in hiring their dealers, the nature of the stockbroking business where share trading transactions by clients are conducted normally through the telephone, and the corresponding need for a system of confirmation by contract notes and notification by clients of discrepancies and errors.
>
> 85 Member companies of the SES hiring persons whether as dealers or otherwise have a duty to screen all such persons to ensure that they are persons of integrity. By the very nature of the stockbroking business, large sums of money are involved in the daily share transactions executed through the member companies. The potential and opportunities for fraud are always present and must be guarded against.
>
> 86 If they hire rogues, then they must be held responsible for all their fraudulent activities and losses vis-a-vis their clients, who have opened accounts with them. This would of course be subject to any estoppel which might operate against the clients. If without the clients' knowledge the employees and dealers of the member company fraudulently use clients' accounts to trade and losses are incurred the member company is not entitled to recoup their losses from these unknowing clients. It is a risk that the member companies have to take and it is open to them to secure insurance against such risk. Between the principal who placed the rogue dealers and employees there and the innocent clients who have no voice in selecting these rogues, it is obvious that the liability for the fraud and the loss resulting therefrom must be borne by the principal.
>
> 87 So in the light of such risks, member companies of the SS have operated a notification system to minimise the risk to themselves of such fraudulent activities, including that of genuine errors in executing trades. This is the system of rendering contract notes and contra statements immediately after the respective trades and the

issuing of regular quarterly statements of transactions to inform and confirm with their clients the transactions that were to have been authorised by them.

88 If their clients, as in this case, knowing that unauthorised transactions had been carried out in their accounts, failed to notify the company or turned a Nelsonian eye to what was happening in their accounts, they would do so at their own peril. For there would come a time when their failure would be sufficient to attract the application of the estoppel principle, and the transactions would then be deemed to have been authorised or adopted/ratified by them. The clients would be held liable to the member company for these transactions because their blameworthy conduct had allowed the fraudulent transactions to continue to the detriment of the member company. The actual or imputed knowledge of the fraudulent transactions would have tainted these clients and removed their cloak of innocence. Consequently the balance of liability as between the two 'innocent parties' (ie the member company versus them) would be tilted against them. Of course the clients would not be precluded from filing a claim against the fraudulent dealer or employee for the loss caused to them.

89 …

90 It must be further recognised that instructions for share trading by clients to the dealers or remisiers of a broking house are normally given over the telephone. The transactions to buy or sell at a particular price are put into the SES electronic trading system by the dealer or remisier upon receipt of those oral instructions. Confirmation of trades done are usually over the phone to the client and thereafter followed by the contract notes. It is well-high impossible for the broking house to track the validity of each and every oral instruction over the phone by their clients to their dealers or remisiers.

91 For the purpose of executing such trades, the remisier or dealer's representative is acting as the agent of the client to input such trades for him into the electronic share trading system of the SES. Such trades punched into the system amount to representations made by the client to buy or sell shares as the case may be at a specific price. vis-a-vis the member company, the remisier or the dealer's representative will be acting within his authority when he executes trades on behalf of his clients.

92 The member company provides the computers and the facilities for the remisier or dealer's representatives for linking with the SES electronic trading system and also manages the administration of such trades by the expeditious issuing and despatch of the necessary contract notes confirming the trades, including the sending out of contra statements, quarterly statements and other necessary documentation to help the clients monitor their trades. As I stated earlier, the contract notes sent directly to the clients are essentially to confirm that the transactions ordered by them have been properly and successfully executed.

93 I did not regard the reliance on a system of contract notes to surface any discrepancies, errors or unauthorised trades as being insufficient or unreliable as to amount to bad business practice. There is a legal duty imposed on the clients, having opened a trading account in which trading instructions are accepted orally, to protest and to surface any discrepancies, errors or unauthorised trades reasonably promptly upon discovery. There is an associated duty to use reasonable diligence to check contract notes sent to them. These are implied duties arising out of the trading

account being opened by the client, the close proximity of their contractual relationship and the foresee ability of damage were there to be no feedback to the member company of any unauthorised trades after discovery.

[87] The court then went on to consider the doctrine of estoppel as applicable in instances where, despite the receipt of voluminous contract notes amounting to evidence of unauthorised transactions, a client chooses to remain silent and not to take issue. In such instances, having full knowledge of the existence of such unauthorised transactions, an estoppel will work as against the client to preclude him from denying liability for any losses arising from such unauthorised transactions, which losses are borne by the member company or stock broking firm or dealer.

The present factual matrix

[88] In the instant case it is evident upon a perusal of the evidence that:

(a) Ms Teh, the defendant's commissioned dealer's representative admitted voluntarily that she had carried unauthorised transactions in the plaintiff's account. She admitted that she had personally traded in the plaintiff's account;

(b) it is not in issue and certainly clear from the evidence of PW1 that he had no knowledge or inkling of the extent of Ms Teh's dishonest activities until September 2012, whereupon he immediately contacted the defendant;

(c) the plaintiff was induced to alter his address by the defendant's agent, Ms Teh, who offered to keep him updated with a more easily understood summary of his trades;

(d) the plaintiff was handed stacks of contract notes which were not genuine but which bore the defendant's logo and appear on the face of it, quite indistinguishable from original contract notes;

(e) the plaintiff was furnished on a daily basis with daily trading records which were sent by facsimile from Ms Teh's office at the defendant's premises to the plaintiff. The plaintiff was thereby induced to believe that his investment monies were being invested in accordance with the instructions issued by him directly to Ms Teh;

(f) the plaintiff never took receipt of the contract notes from the unauthorised trades, and therefore had no knowledge of the unauthorised trades executed by Ms Teh for her personal benefit, nor of the existence of the voluminous number of contract notes, contra statements and monthly statements from the central depository that had been diverted cleverly, if dishonestly, by Ms Teh to her own address;

(g) with regards to monies deposited by the plaintiff as payment for shares purportedly purchased on his behalf by Ms Teh, the defendant acceded to the directions or instructions given by Ms Teh to allocate these monies into accounts other than that of the plaintiffs. There was no system in place to enable the defendant to ascertain whether the monies deposited by the plaintiff in cash were actually correctly allocated to the plaintiff. This is because the entire responsibility for the correct allocation of such monies is placed in the hands of the dealer's representative by the defendant. There is no system in place to audit the correct allocation of such monies. The defendant relies on the feedback of the client to correct or rectify any such wrongful allocation of monies. If, as in the instant case, monies were paid by cash and the dealer's representative wrongfully allocated the monies to other accounts and diverted the receipts issued by the defendant, there is no system in place to detect such fraudulent conduct. Hence Ms Teh's unauthorised trading which was excessive was allowed to continue for some three years without being detected.

[89] It is clear from the foregoing that the plaintiff is indeed an innocent party who was unaware that his account was being used for unauthorised trading by Ms Teh. It would in fact appear from the investigation report that the orders he placed with Ms Teh were not fully executed either. In other words, not only were his orders not taken and executed, but other trades which he did not authorise were conducted in his account.

[90] The issue of estoppel or ratification or waiver cannot arise in the instant case as there is no evidence that the plaintiff was aware at any time of the abuse or misuse of his share trading account. The plaintiff cannot be faulted for Ms Teh's act of inducing the plaintiff, who is not conversant with the English language and who cannot read, to have his voluminous documentation comprehensively stored and kept for him while she personally updated him on a daily basis with fictitious documentation. While he was naive, he cannot be said to have wilfully turned a blind eye to any wrong doing. This is because he was entirely unaware of any wrongdoing on Ms Teh's part. In these circumstances it appears to be clear to this court that the defendant as principal is liable for the fraudulent or dishonest or unauthorised acts of its agent, Ms Teh.

[91] I am fortified in arriving at this conclusion by s 190 of the Contracts Act 1950 which provides as follows:

> 190 Liability of principal inducing belief that agent's unauthorized acts were authorised
>
> When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by those acts or obligations if he has by his words or conduct induced such third persons to believe that those acts and obligations were within the scope of the agent's authority.

[92] In the instant case, Ms Teh has, without authority, done acts, namely transacted in the plaintiff's trading account for herself. She has executed these unauthorised transactions in her capacity as a dealer's representative, which means that she was acting as the defendant's agent. As such the defendant is the principal. It therefore follows that the defendant as principal is bound by her unauthorised acts, so long as the defendant induced or allowed the plaintiff to believe that Ms Teh was acting within the scope of her authority as the defendant's agent.

[93] This brings us to the question of whether Ms Teh was in fact acting within the scope of her authority when she undertook the unauthorised trades. Under the provisions of Ms Teh's contract with the defendant she is authorised by the defendant to deal in securities and to accept and execute orders from clients (see cl 2 above). As such when Ms Teh undertook the unauthorised trades, she was executing transactions which she was authorised by the defendant to undertake in the normal course of her duties. In other words it is in the ordinary course of business for Ms Teh as the defendant's agent to transact in the purchase and sale of shares. To that extent therefore it can be said that Ms Teh was acting within the scope of her apparent authority, although dishonestly, in so far as the plaintiff and the defendant were concerned.

[94] In *Bowstead & Reynolds on Agency* (19th Ed), Sweet & Maxwell the position in law is set out thus:

> An act of an agent within the scope of his apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance if his own interests.

[95] A case on point is *Chien Chung Ming v Kay Hian & Co Pte & Anor* [1992] 4 CLJ (Rep) 366, a decision of the High Court of Singapore. In that case the plaintiff who was a client of the dealer's representative and held a margin account with the broker sought the return of 12 lots of shares that had been handed over to the remisier, but never received by the plaintiff. The remisier's agreement was considered and the court concluded that it was implied from cl 1 of the said agreement that the remisier had authority to collect from and deliver to clients, on behalf of the broker, ie the principal, certificates in respect of shares bought and sold or be kept as security for the client. As the share certificates were never handed to the client the issue of whether the broker was liable for the acts of its fraudulent remisier. In these circumstances it was held that the broker was liable for the acts of his agent. This was because the agent was acting within the scope of his authority. Simply because the agent was acting fraudulently and in furtherance of his own interests, this did not cease to bind the principal. In arriving at this decision the court relied, inter alia, on the well-known decision of *Lloyd (Pauper) v Grace,*

Smith & Co [1912] AC 716, where a firm of solicitors was held liable as principal for the fraudulent acts of its managing clerk who induced one of the firm's clients to sign away all she possessed and took the proceeds into his own pocket. At all times he had been authorised by the firm to act on its behalf as the firm's representative. The client treated him as such. Lord Loreburn in his judgment stated, inter alia,:

> …It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal.
>
> If the agent commits the fraud purporting to act in the course of business such as he was authorised, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it.

[96] Reference was also made to *Powell v Wontner & Renwick (a firm)* reported in the Solicitor's Journal Vol 106 p 197. In that case the defendants, a firm of stockbrokers employed one F as a jobber's ledger clerk. It was agreed that while he was in their employment, F might continue to deal with his own following of customers who transacted stock exchange business through him on terms that such transactions would be conducted through the defendant's firm which would earn commissions on such transactions, one third of which would be paid to F. The plaintiff who had previously transacted business through F had an account opened in his name with the defendant stockbroker's firm after F joined. The only communications between the defendant firm of stockbrokers and the plaintiff were statements of his account, contract notes and an occasional letter. Subsequently the stockbrokers terminated F's employment but he remained for the balance of that particular month to clear up the affairs of his customers. During this time, on F's suggestion and advice the plaintiff instructed F to buy some shares through a nominee company of F's bank and paid F some monies for these shares. The plaintiff received a copy of a bought note for the shares together with one of the defendant's compliments slips.

[97] However by the end of that month, F had caused the bank's nominees to sell a parcel of the shares and a few months later the remainder of the shares and the bank to credit the proceeds to his private account. It was later ascertained that the shares had been bought on F's orders and on his account. The plaintiff sued the defendant stockbrokers for damages for breach of contract, and contended that F, in receiving his orders and in purporting to carry them out but in fact failing to do so, was acting within the scope of his actual or ostensible authority as their servant so that they were bound by the contract made and broken by F.

[98] In these circumstances, judgment was given for the plaintiff. It was held that it would be unjust if the defendant firm of stockbrokers were allowed to retain the benefit of F's acting as a stockbroker towards his own clients and at the same time divest themselves of all responsibility for his conduct while so acting. In effect the court held that F was acting within the scope of his employment and that the contract he made was binding on his employers. The effect of the contract was that the stockbrokers, through F, undertook that F should retain control of the shares for the plaintiff's benefit and they were liable for breach of that undertaking notwithstanding that F caused the shares to be sold after leaving their service:

> …It was plain that where a master permitted a servant to represent himself as having authority, and, with knowledge that the servant was doing so, accepted the benefit of what the servant had done, then the holding out of himself by the servant as having authority was a holding out for which the master was responsible. There need be no direct representations made by the master before holding out might take place.

[99] It follows from the foregoing authorities that Ms Teh was acting within the scope of her authority in:

(a) executing trades in the plaintiff's share trading account in respect of which she received no instructions; and

(b) failing to execute trades in the plaintiff's share trading account which she had been authorised to execute.

[100] Here it is beyond dispute that the defendant held Ms Teh out as having the authority to execute trades for the plaintiff on behalf of the defendant in her capacity as a dealer's representative. The fact that she was an agent and not an employee makes no tangible difference to the holding out. As such, the defendant at all times held out to the plaintiff, as it did to other clients, that Ms Teh had the authority to execute trades for clients on behalf of the defendant. It follows that the defendants are therefore liable for the dishonest acts or unauthorised trades undertaken by Ms Teh, in as much as the trades which she failed to execute, notwithstanding the receipt of express instructions from the plaintiff.

Deposit of monies by the plaintiff in the general collection account

[101] If I am incorrect in my conclusion above, the issue of liability may also be dealt with from the perspective of the deposit of monies by the plaintiff directly with the defendant. It is not in dispute that the defendant deposited over the course of some three years, a sum of RM1,937,207.90 directly into the

defendant's general account. The workings of this account have been summarised earlier on in this judgment. The legal effect of the deposit of such monies may be analysed thus:

> Upon depositing these monies, the monies were retained by the defendant as trustee on behalf of the plaintiff. Put another way, the defendant, upon such deposit, owed a duty of care to the plaintiff to ensure that the monies so deposited were properly and correctly allocated to the plaintiff's share trading account for trades carried out by the plaintiff.
>
> The dealer's representative is, under this system, accorded the duty by the defendant of identifying and requesting the allocation of monies to the correct account. In other words, the dealer's representative is authorised to instruct how the monies are to be allocated to the various client's account. The defendant itself has no knowledge of who the monies belong to, and is entirely reliant upon the dealer's representative to identify and instruct allocation to clients' accounts.
>
> In doing so, the dealer's representative is acting on behalf of the defendant, in ensuring the correct allocation of monies to the correct account. At all material times therefore, when the Ms Teh sought allocation of monies from the defendant's general account to the plaintiff's or other share trading accounts, she was acting on behalf of the defendant. Once the monies are deposited with the defendant and the defendant is in possession of the plaintiff's monies, such that it holds the same on trust for the plaintiff, it becomes incumbent upon the defendant to ensure that the monies are allocated correctly. The defendant is thereby authorised to allocate the monies correctly. The defendant in the instant case however, delegates that authority entirely to the dealer's representative.
>
> As the authorisation for such allocation (after the monies have been deposited into the defendant's general account such that it falls within the possession of the defendant) emanates from the defendant and not the plaintiff, it is the defendant who authorises the dealer's representative to identify and allocate the monies. As such the dealer's representative is clothed with the ability to allocate monies from the general account by the defendant. The dealer's representative is therefore, in this context, the defendant's agent. Where, therefore, the dealer's representative wrongfully deals with the plaintiff's monies on behalf of the defendant, the defendant as principal, becomes liable. This is because the defendant has clothed the dealer's representative with the responsibility for the allocation of monies deposited with it. It follows that the defendant is liable for the fraudulent acts of its agent, who has actual or apparent authority, to deal with the monies on behalf of the defendant, so as to allocate it to the plaintiff's account.

[102] From the perspective of the general deposit of monies too, it would appear that the defendant is liable for the unauthorised and dishonest acts of Ms Teh.

Issue (iii): Is the defendant liable in tort or breach of trust?

[103] I have considered the liability of the defendant extensively in contract

and concluded that the defendant is indeed liable for the unauthorised acts of its agent, Ms Teh. Given the foregoing, it is not necessary, to my mind to explore the alternative liability in tort. This is particularly so as the primary nature of the nexus between the plaintiff and the defendant is premised on contract. This is not to say that there is no liability in tort. In all probability if an analysis were undertaken liability may well be found under this head. However the plaintiff makes claims premised on tort and breach of trust in the alternative to his cause of action in contract. As I have found such liability in contract it is not necessary to consider an alternative course of action in tort or breach of trust.

Issue (iv): What are the losses suffered by the plaintiff?

[104] The plaintiff makes claim for the full sum of RM1,937,207.90 as set out above. It is not in dispute that the plaintiff actually deposited this sum of money with the defendant as payment for shares purportedly purchased by Ms Teh on his behalf, when as a matter of fact no such shares were purchased. While it may appear prima facie correct that the plaintiff is entitled to a refund or compensation of his entire investment, there is one other important factor that has to be taken into account.

[105] It is not in dispute that the plaintiff did in fact instruct trades, and that Ms Teh did execute some of his instructions. However neither the plaintiff nor the defendant as of the date of this trial, have made any attempt to try and ascertain to what extent Ms Teh actually carried out the trades instructed by the plaintiff. If some of those instructions had in fact been carried out correctly, then the plaintiff is not entitled to make claim for such transactions unless there were profits accruing from such transactions. It might well be the case that such trades as were instructed by the plaintiff and duly executed by Ms Teh resulted in contra-losses.

[106] It therefore becomes apparent that in order to ascertain the true losses suffered by the plaintiff it is necessary to undertake the tedious task of reconciling the genuine orders placed by the plaintiff against the orders undertaken by Ms Teh in the plaintiff's account.

[107] With respect to the monies that were wrongfully allocated to other clients' share trading accounts, a tracing exercise ought ideally to be carried out and the monies wrongfully allocated returned to the plaintiff's account. Until this is done it is not possible to assess the plaintiff's losses with any degree of certainty. I am therefore unable to accede to the entirety of the plaintiff's claim for a liquidated sum of RM1,937,207.90 but instead order that an inquiry or assessment of damages be undertaken to gauge or calculate the actual loss

incurred by the plaintiff. I make such order under the alternative prayer in the statement of claim allowing this court to order 'such further or other relief as is considered fit'.

[108] The costs of this suit are to be borne by the defendant in the sum of RM45,000.

Plaintiff's claim allowed with costs of RM45,000.

Reported by Kohila Nesan